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No. 81-1958

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, et al.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY OF ARIZONA ELECTRIC POWER COOPERATIVE, INC., TO THE RESPONSES OF THE WEST VIRGINIA PUBLIC SERVICE COMMISSION, KENTUCKY WEST VIRGINIA GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC. AND MICHIGAN WISCONSIN PIPE LINE COMPANY TO ITS MOTION FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

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KENTUCKY WEST VIRGINIA GAS COMPANY,
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TO ITS MOTION FOR CONTEMPORANEOUS CONSIDERATION AND
DISPOSITION OF PETITIONS FOR CERTIORARI

Arizona Electric Power Cooperative, Inc. (AEPCO) hereby replies to the above-identified responses to its Motion for Contemporaneous Consideration and Disposition of Petitions for Certiorari. The State Commission filed a response in opposition and the three pipelines filed a joint response in opposition. AEPCO's Motion asked the Court to consider its petition simultaneously with the petition in Pennzoil Company v. Public Service Commission of West Virginia, No. 81-1672, because of direct conflict between the decision of the highest court of a state there and a Federal Court of Appeals decision here.

The State Commission argues that the decision of the West Virginia Supreme Court of Appeals was silent on the basis for its decision affirming the agency. The Commission states that several other possible grounds were presented to the Court on which it could have relied.[1/] But, the State Commission opinion relied exclusively on the federal regulations reversed in Mid-Louisiana as support for its decision. The State Commission argument that the State

1/ The West Virginia Commission in its opposition to the petition for certiorari in Case No. 81-1672 (pp. 9-16) listed a variety of grounds which the West Virginia Court could have relied on.

Supreme Court would affirm an administrative agency decision on different grounds from those asserted by the agency, without any indication of such a departure from the usual course of judicial practice, is without merit. This Court in S.E.C. v. Chenery Corp., 318 U.S. 80, 94-95 (1943), held that a reviewing court may affirm an administrative order only on the grounds enunciated by the agency. We have not found any West Virginia cases departing from this general judicial practice, which is rooted in the need to avoid judicial usurpation of administrative functions. The pipelines rely primarily (p. 2) on the State Commission's erroneous view concerning the basis for the decision by the West Virginia Supreme Court.

The pipelines also argue (p. 2) that the State Commission relied on Section 602 of the NGPA, 15 U.S.C. § 3432 to impose a rate lower than the NGPA prices on the alternative ground that "...the West Virginia Commission had the power under Section 602 of the NGPA to prescribe lower maximum lawful prices for production within the state,"citing page 25b of the Appendix. This page contains the Commission's findings of fact and conclusions of law. It does not refer to Section 602 of the NGPA and thus does not support the argument made by the pipelines.

None of the oppositions deny that there is a conflict between the express holdings of the two courts below on the first sale issue. Instead, they argue that the State Court could have decided on other grounds and that under such circumstances, conflict on one issue does not warrant the granting of certiorari. But, ever if Section 602 of the NGPA presents an independent ground, the law with respect to how a state implements its powers under that section to escape the application of the NGPA price ceilings for "first sales" presents an issue of first impression which has not yet been resolved by any court. Thus, the alleged independent ground here is vague and uncertain. This distinguishes Monrosa v. Carbon Black Inc., 359 U.S. 180 (1959) relied on by the pipelines (p. 3) because there the sufficiency of the alternate gound was undisputed.

The pipelines' opposition to AEPCO's Motion for summary reversal of Mid-Louisiana and summary affirmance of Pennzoil rests on the false premise that unanimity of a single panel precludes egregious error. There is no such limit on the discretion of this Court to render per curiam opinions on the basis of Petitions for Certiorari and briefs in opposition thereto.

Therefore, the arguments of the State Commission and the pipelines are lacking in merit and AEPCO's Motion should be granted.

Respectfully submitted,

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May 7, 1982

CERTIFICATE OF SERVICE

I, Arnold D. Berkeley, a member of the Bar of this Court and counsel fpr Arizona Electric Power Cooperative, Inc., do hereby certify that, on its behalf, I have this day served, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, a copy of the foregoing Reply of Arizona Electric Power Cooperative, Inc. to the Responses of the West Virginia Public Service Commission, Kentucky West Virginia Gas Company, Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company to its Motion for Contemporaneous Consideration and Disposition of Petitions for Certiorari, by first-class mail, postage prepaid, upon the following:

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